



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of the Late Alexander Chimungeni Augustine Agutu (Deceased)  
(Succession Cause 101 of 1994) [2024] KEHC 1144 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1144 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 101 OF 1994  
RN NYAKUNDI, J  
FEBRUARY 12, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE ALEXANDER  
CHIMUNGENI AUGUSTINE AGUTU (DECEASED)**

**IN THE MATTER OF**

**ROSE ANNABEL KOKONYA ..... 1<sup>ST</sup> APPLICANT**

**PAUL CHIMUNGENI ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. There are two applications in this matter. The 1<sup>st</sup> application is a notice of motion dated 19/10/2023 expressed to be brought under Art. 159 of the Constitution and section 74 of the Law of Succession Act. It seeks the following orders;
  - a. That new assets belonging to the estate have been discovered and needs to be incorporated in the grant and distributed.
  - b. The certificate of Commission of Grant issued on 2/5/2000 be rectified to the extent that property described as Marama/Shinamwenyuli/620, Marama/Shinamwenyuli/625 and Marama/Shinamwenyuli/1234 be included in schedule to the grant.
  - c. The certificate of commission of grant issued on 21/4/2022 be rectified to the extent that property described as Marama Shinamwenyuli/426 in the grant be amended to read Marama/Shinamwenyuli/1712.
  - d. The new parcel of land be distributed in the manner proposed in the supporting affidavit hereof.
2. In support of the application is an affidavit by the administrator Rose Annabel Kokonya dated 19/10/2003. The second application is one dated 1/12/2023 expressed be brought under section 1a, and 3a of the Civil Procedure Act, (cap 21 and Order 2 rule 15, and 51 rules 1 and 3 Civil Procedure



Rule, 2010, Article 31,45,50,159,165 (3) (a) (b), & 259 of the Constitution of Kenya and rule 4 & 24 of the Constitution of Kenya (protection of rights and fundamental freedoms) Practice and Procedure rules, 2013)

1. That this application be certified urgent and service be dispensed with in the first instance.
  2. That this court be pleased to strike out and remove its records the application for being outright scandalous, frivolous, vexatious or otherwise an abuse of the court process.
  3. That this court gives further directions as it may deem just and fit on the instant dispute before it.
  4. That the respondents be condemned to pay costs.
3. In support of the application is an affidavit sworn by Jacqueline Onyango dated 23/11/2023.

### **Decision**

4. I have considered both applications and it seems to be at cross purposes. As regards the 1<sup>st</sup> application dated 19/10/2023 the threshold to be met by the applicant is as stated in the Succession Act as follows;

6. Rectification of grant is provided for in section 74 of the Law of Succession Act, Cap 160 Laws of Kenya and rule 43 (1) of the Probate & Administration Rules. Section 74 provides as follows;

“Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant may be rectified by the court, and the grant of representation whether before or after confirmation, may be altered and amended accordingly.

7. Rule 43 (1)

“Where the holder of the grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time and place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made.”

5. The superior courts have gone ahead to pronounce themselves on the meaning of the word rectification;

In the Matter of the Estate of Hasalon Mwangi Kabero [2013] eKLR

“An error is essentially a mistake. For the purpose of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased’s death, or the purpose of a limited grant is an omission of a name or in the description of a thing an error? It would be an error if say, a word in the full name or a person is omitted or a work or number or figure in a description is omitted.

But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning or the word “error” too far to say that would amount to the error or mistake envisage in Section 74 Rule 43.”



6. In addition, *in the matter of the Estate of Geoffrey Nyamwinga (deceased)* (2013) eKLR

“The law on rectification or alteration of grants in section 74 of the *Law of Succession Act* and rule 43 of the *Probate and Administrations Rules*...what these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations and therefore the power given to the court by these provisions is not general...

Where a proposed amendment of a grant cannot be dealt with under the provisions of section 74 of the *Law of Succession Act*, the applicant ought to approach the court under order 44 of the *Civil Procedure Rules*. A review under Order 44 of the *Civil Procedure Rules* may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision – order 44 of the *Civil Procedure Rules* on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant.

7. From the foregoing provisions the inherently competency of the probate court is at once apparent. By dint of these provisions the concept of rectification is much narrower than the many motions I see filed before this court largely changing the character of the certificate of confirmation of grant. Again on the issue of free assets survived of the deceased, probative evidence in support of such ownership, registration, interest and rights within the scope of our regulatory framework is of fundamental importance. That is not the case here as demonstrated by the affidavit of the applicant. It is just an inventory and particulars of properties alleged to form part of the intestate estate with no cogent evidence. In urging this court to list the properties as part of the deceased estate under Section 74 of the Act would be ultra vires the letter and spirit of the statute. I am persuaded at this stage to dismiss the notice of motion dated 19/10/2023.

8. In so far as the appointment on who qualifies as a legal representative in intestacy section 66 of the *Law of Succession Act* sets out the order of ranking. In this Section the court retains the jurisdiction to be exercised judiciously to effect the administration of the estate. A central finding from all these is that there is no error of fact or law to review the decision of this court. The grant was given to the applicant due the existence of the evidence which shows that there are beneficiaries to the deceased estate. I do not find it necessary to revoke the order as stipulated elsewhere during the hearing of the instant application. The persons so named in the grant may entertain some personal differences as to who is better placed to administer the estate of the deceased by that is neither here nor there in so far as the probate court is concerned. For the above reasons the administrators are under a legal duty to administer the estate faithfully in reference to section 83 of the *Law of Succession Act*. The question as to whether the deceased assets remain out there uncounted as to the identity, share or estate falls squarely within the scope of the appointed administrators. I have noted that the application citing some of the free assets survived of the deceased but not included in the Certificate of Confirmation of grant require more investigations as to the instruments of ownership a consequence of which a proper application shall be made at an opportune time for amendment of the certificate of confirmation and corresponding consents indicative of distribution.

9. In order to do this a status conference be held on 19<sup>th</sup> March, 2024 to deal with such matters.

**DATED SIGNED AND DELIVERED THIS 12TH DAY OF FEBRUARY, 2024**



.....  
**R. NYAKUNDI**  
**JUDGE**

